

941175 DEC 19 1994

No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY S. BLUMENTHAL
Counsel of Record
KAMM & SHAPIRO, LTD.
230 West Monroe Street
Suite 1100
Chicago, Illinois 60606
(312) 726-9777
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether, despite the express grant of jurisdiction to the United States district courts in the Expedited Funds Availability Act, the 7th Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve Board pursuant to the Congressional delegation of authority contained in the Act.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE	5
ARGUMENT	6
Introduction	6
I.	
The Seventh Circuit's decision deprives banks of the remedy specifically granted by Congress and will therefore subvert the purposes of the Expedited Funds Availability Act	9
II.	
The Seventh Circuit improperly ignored prece- dent establishing that there is subject matter jurisdiction under 28 U.S.C. Sec. 1331 because this cause arose under the laws of the United States	12
CONCLUSION	15

APPENDIX

	APP. PAGE
Opinion of the Seventh Circuit Court of Appeals (July 11, 1994)	1
Judgment Order, Seventh Circuit Court of Appeals (July 11, 1994)	4
District Court Memorandum Opinion, Motion for Summary Judgment (August 31, 1993)	5
District Court Judgment (August 31, 1993)	15
District Court Order (August 31, 1993)	16
District Court Memorandum Opinion, Motion to Dismiss (November 25, 1992)	17
District Court Order (November 25, 1992)	23
Order of Seventh Circuit Court of Appeals deny- ing Petition for Rehearing (September 20, 1994) .	24

TABLE OF AUTHORITIES

CASES:	PAGE
<i>American Well Works Co. v. Layne & Bowler Co.</i> , 241 U.S. 257 (1916)	14
<i>Chasse v. Chasen</i> , 595 F.2d 59 (1st Cir. 1979) ...	13, 14
<i>Coit Independence Joint Venture v. Federal Sav- ings and Loan Insurance Corp.</i> , 489 U.S. 561 (1989)	11
<i>Farmer v. Philadelphia Electric Company</i> , 329 F.2d 3 (3rd Cir. 1964)	13, 14
<i>Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California</i> , 463 U.S. 1 (1983)	14
<i>K-Mart Corp. v. Cartier, Inc.</i> , 467 U.S. 837 (1988) .	10
<i>Merrell Dow Pharmaceutical v. Thompson</i> , 478 U.S. 804 (1986)	14
<i>Stevens v. Carey</i> , 483 F.2d 188 (7th Cir. 1973) ...	14
STATUTES:	
Title 5 U.S.C. Sec. 551 <i>et seq.</i>	13
Title 12 U.S.C. Sec. 4001	7
Title 12 U.S.C. Sec. 4007(b)	9
Title 12 U.S.C. Sec. 4008	9
Title 12 U.S.C. Sec. 4010	10
Title 12 U.S.C. Sec. 4010(a)	10
Title 12 U.S.C. Sec. 4010(b)	10
Title 12 U.S.C. Sec. 4010(d)	7, 10, 11

Title 12 U.S.C. Sec. 4010(f)	10, 11
Title 28 U.S.C. Sec. 1331	13
REGULATIONS:	
12 CFR Part 229	7
12 CFR Sec. 229.30	10
12 CFR Sec. 229.33(b)(8)	10
12 CFR Sec. 229.38(g)	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, First Illinois Bank and Trust,¹ respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1994.

¹ When originally filing this action, plaintiff, an Illinois Banking Corporation, was known as First Illinois Bank & Trust. Its name was subsequently changed to First Illinois Bank and it is now known as Bank One Chicago, N.A. It is wholly owned by Banc One Illinois Corporation, an Illinois Corporation, which is wholly owned by Banc One Ohio, an Ohio corporation.

OPINIONS BELOW

The district court issued two (2) memorandum opinions: (1) on August 31, 1993, granting First Illinois' (Petitioner's) Motion for Summary Judgment and denying Midwest Bank's (Respondent's) Cross Motion for Summary Judgment; and (2) on November 25, 1992, denying Midwest Bank's Motion to Dismiss. The opinions are reproduced, respectively, at pages App. 5-14, and App. 17-22. They are not reported.

The opinion of the Seventh Circuit Court of Appeals is reported at 30 F.3d 64 (7th Cir. 1994) and it is printed in the Appendix as pages App. 1-3. In response to the Petition for Rehearing filed by Petitioner, on September 20, 1994, the Seventh Circuit entered its order amending its original opinion. This order is not reported, but it is reproduced at pages App. 24-25.

JURISDICTION

On July 11, 1994, the Seventh Circuit Court of Appeals entered its order vacating the summary judgment entered by the district court in favor of Petitioner, First Illinois Bank. After Petitioner filed a timely Petition for Rehearing, on September 20, 1994, the court entered its order denying the Petition for Rehearing.² Jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. 1254(1).

² The court made minor corrections to its original decision, but the gravamen of the decision remained the same.

STATUTES AND REGULATIONS

STATUTES

Title 12 U.S.C. Sec. 4010:

Civil Liability

Sec. 611(a) CIVIL LIABILITY. - Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this title or any regulation prescribed under this title with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of . . .

. . .

(d) JURISDICTION - Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

. . .

(f) AUTHORITY TO ESTABLISH RULES REGARDING LOSSES AND LIABILITY AMONG DEPOSITORY INSTITUTIONS. - The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

Title 28 U.S.C. Sec 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

REGULATIONS

Regulation CC 12 CFR Part 229:

Section 229.38 Liability

(a) Standard of care; liability; measure of damages. A bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart. A bank that fails to exercise ordinary care or act in good faith under this subpart may be liable to the depository bank, the depository bank's customer, the owner of a check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith under this subpart may be liable for other damages, if any, suffered by the party as a proximate consequence. Subject to a bank's duty to exercise ordinary care or act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others. This section does not affect a paying bank's liability to its customer under the U.C.C. or other law.

(b) Paying bank's failure to make timely return. If a paying bank fails both to comply with § 229.30(a) and to comply with the deadline for return under the U.C.C. Regulation J(12 CFR Part 210), or § 229.30(c) in connection with a single non-payment of a check, the paying bank shall be liable under either § 229.30(a) or such other provision, but not both.

(c) Comparative negligence. If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in indorsing a check (§ 229.35), accepting a returned check or notice of nonpayment (§§ 229.32(a) and 229.33(c)), or otherwise, the damages

incurred by that person under § 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person.

...

...

...

(g) Jurisdiction. Any action under this subpart may be brought in any United States district court, or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

STATEMENT OF THE CASE

In the course of its daily check clearing operations, Midwest Bank negligently failed to advise Petitioner, First Illinois Bank, that it was returning a check because it was "NSF." As a result, Petitioner lost over \$40,000.00. Midwest's action violated the duties imposed by the Federal Reserve Board in Regulation CC, 12 CFR Part 229; specifically, its duty to use ordinary care in timely advising a depository bank of the reasons for returning a check unpaid. 12 CFR Sections 229.30 and 229.33(b)(8).

In accordance with the jurisdictional grant of authority expressed by Congress in the Expedited Funds Availability Act (the "EFAA"), Title 12 U.S.C. 4010(d), Petitioner filed suit in the district court to obtain the remedy contemplated by Congress and the Federal Reserve Board. See, 12 CFR Secs. 229.38(a) & (g). Because its right to relief was clear, the district court granted First Illinois' motion for summary judgment. Midwest appealed.

During oral argument, *sua sponte*, the reviewing court questioned the district court's original subject matter juris-

diction.³ On July 11, 1994, the Court of Appeals for the Seventh Circuit ruled that, contrary to the plain language expressed by Congress in the EFAA and the specific regulations promulgated by the Board of Governors of the Federal Reserve System, the district court had no original jurisdiction to hear this cause. Accordingly, the court ordered that the case be remanded to the district court with instructions that it be dismissed for want of subject matter jurisdiction. Plaintiff filed its request for rehearing which was denied.

ARGUMENT

Introduction

The Seventh Circuit's erroneous decision has national consequences; it affects every member bank of the Federal Reserve System as demonstrated by the recent dismissal of a case involving a loss exceeding \$3.7 million.⁴ Recognizing the significance of the decision, the United States, through the Department of Justice, on behalf of the Board of Governors of the Federal Reserve System, as well as the New York Clearing House Association⁵ and Standard Bank and

³ Because of the clear language in both the EFAA and Regulation CC regarding federal jurisdiction, this issue had never before been raised in the proceeding.

⁴ *NBD Bank v. Standard Bank and Trust Company*, No. 93 C 7224 (N.D. Ill.). Based on the Seventh Circuit's decision, *NBD* has been dismissed by the district court and an appeal is pending.

⁵ An association of 11 leading commercial banks in New York City. Its members are: The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

Trust Company⁶ voluntarily filed their briefs as *Amicus Curiae* supporting Petitioner's request for a rehearing and urging the Seventh Circuit to reconsider its erroneous decision.

Ignoring the plain language of both the EFAA and Regulation CC, the Seventh Circuit Court of Appeals has crossed the line separating its duty to protect the federal courts from the proliferation of civil litigation and its statutory mandate to serve as an arbiter of disputes arising under federal laws and regulations. In a case of first impression, the two (2) page opinion it issued "resolving" this case will wreak havoc with the intricate check return system essential to the routine daily operations of the nation's banks, and in the process will defeat an essential purpose of the EFAA. Title 12 U.S.C. 4001 *et seq.*

The Seventh Circuit's opinion nullifies regulations promulgated by the Federal Reserve Board in accordance with the statutory authority delegated by Congress, finding that, contrary to the express language of 12 U.S.C. 4010(d), there exists no Federal subject matter jurisdiction to resolve interbank disputes arising under Regulation CC, 12 CFR Part 229.

Not only Petitioner, but **every member institution of the Federal Reserve System** (a vast majority of banks in the United States) will be affected by the Seventh Circuit's decision. As stated by the Board:

if uncorrected, [the Seventh Circuit's decision] would disrupt the system of interbank liability crafted in response to the EFA Act and replace it with, at best, a hodge-podge of inefficient procedures and, at worst, no remedy at all. The administrative forum hypothesized by the panel [the Seventh Circuit] does not exist within

⁶ See note 4, *supra*.

any of the financial institution regulatory agencies responsible for enforcing the EFA Act Accordingly, the [Seventh Circuit's] decision leaves payment system participants without a forum for vindication of their EFA Act causes of action, and casts doubt upon the availability of any single forum for the resolution of check payment system disputes.

Brief For Board of Governors of the Federal Reserve System as Amicus Curiae in support of Plaintiff-Appellee's Petition for Rehearing, p. 3.⁷

In its curt opinion, the Seventh Circuit's sole justification for its decision rests on its misconstruction of the plain Congressional language, a construction which conflicts with the Federal Reserve Board's interpretation of the Act. In place of the void it creates by eliminating the judicial remedy Congress provided in the EFAA, the court directs banks to bring their disputes to the Federal Reserve Board. However, as argued by the Board as well as all of the other parties, the administrative remedy envisioned by the court does not exist and cannot constitutionally exist given the absence of any statutory authority allowing the Board to create the administrative tribunal the Seventh Circuit envisions. Failure to reverse the Seventh Circuit's erroneous decision will subvert the purposes of the EFAA by prohibiting all banks from pursuing the remedy Congress provided them in order to protect themselves when following the funds availability guidelines mandated.

⁷ Petitioner will cite the *Amicus* brief submitted to the Seventh Circuit by the Federal Reserve Board as the "FRB Brief," the brief submitted by the New York Clearing House Association as the "NYCH Brief" and the brief of Standard Bank and Trust Company as the "SBT Brief."

I.

The Seventh Circuit's decision deprives banks of the remedy specifically granted by Congress and will therefore subvert the purposes of the Expedited Funds Availability Act.

Congress passed the EFAA motivated by concerns that banks were unduly delaying the availability of funds to their customers by placing "holds" on checks deposited by the customers. These holds were necessary to protect banks against the risks of nonpayment inherent if the funds were withdrawn prior to the check's return. *See*, Preamble to Regulation CC, 53 Fed. Reg. 19372 (May 27, 1988). Congress enacted the EFAA to ensure prompt availability of funds to depositors, but in doing so, recognized the need to establish a uniform, inter-bank system of expeditious return to ameliorate the risks to banks resulting from unpaid checks. FRB Brief, pp. 4-5. It is senseless to imagine that Congress would have left enforcement of the causes of action created by the Federal Reserve Board, to at best, each state to decide according to its whim.

The complementary Congressional goals—speeding funds availability while protecting banks against non-payment risks—are reflected in the structure of the EFAA. Thus, Congress specifically legislated funds availability issues, but deferred to the Board's expertise by delegating to it broad rule-making authority in the areas not addressed by Congress; check collections and return systems. 12 U.S.C. 4008. Congress' desire to make uniform and even supplant existing state laws regarding check collection is evident, because the EFAA provides that the Board's regulations regarding check collection supersede inconsistent state laws, and particularly the Uniform Commercial Code. 12 U.S.C. Sec. 4007(b).

The "Civil Liability" section of the EFAA reflects the complementary roles envisioned by Congress. Thus, in subsec-

tions 4010(a) and (b), Congress specifically legislated the damages recoverable by consumers, persons or classes "other than another depository institution." 12 U.S.C. 4010(a) and (b). In contrast, in subsection (f), Congress delegates to the Board authority to promulgate rules providing for civil liability among banks for disputes arising out of "any aspect of the payment system." 12 U.S.C. 4010(f). It was for violation of those rules (12 CFR Reg 229.30 and 229.33(b)(8)) that Petitioner originally brought its action against Midwest Bank in the district court.

It is apparent from the plain language of sub-section 4010(d), as well as the placement by Congress of both subsections (a) and (f) in Section 4010 that Congress intended for the district courts to have jurisdiction over disputes arising under both subsections—that is in disputes between consumers and banks **as well as inter-bank disputes**. Both sub-sections were purposefully placed in Section 4010, entitled "Civil Liability," leaving no doubt that sub-section (d) applies to causes of action arising under both subsections (a) and (f). Thus, sub-section (d) provides: "[a]ny action **under this section** [Section 4010, Civil Liability] may be brought in any United States district court" 12 U.S.C. Sec. 4010(d) (emphasis added).

Citing *K-Mart Corp. v. Cartier, Inc.*, 467 U.S. 837 (1988), the Board argued to the Seventh Circuit that its (the Board's) interpretation of the EFAA—that sub-section 4010(d) provided a federal jurisdictional basis for actions under 4010(a) **and 4010(f)**—is entitled to judicial deference. The Board's interpretation of the EFAA is apparent from Regulation CC itself, wherein the Board parrots the Congressional language, specifically providing for district court jurisdiction to resolve disputes arising under the Regulation. 12 CFR Sec. 229.38(g).

In more detail than is necessary here, the Board thoroughly analyzed Section 4010 to reach its conclusion that

sub-section 4010(d) plainly confers federal jurisdiction to resolve inter-bank disputes arising under sub-section 4010(f). FRB Brief, pp. 11-13. However, the Board went even further.

Citing this Court's recent opinion in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561 (1989), the Government also argued that the Seventh Circuit's construction of the EFAA is inconsistent with the "statutory language, structure and purpose" of the Act. FRB Brief, pp. 14-19. The Board concludes that its failure to establish an administrative procedure to resolve inter-bank disputes is not only consistent with the EFAA, but that the EFAA does not even authorize it to hear and resolve such disputes. In short, the Board recognizes that under the EFAA, as enacted by Congress, contrary to the unjustified interpretation adopted by the Seventh Circuit, the only uniform method to provide civil liability in inter-bank disputes is to construe sub-section 4010(d) as providing Federal subject matter jurisdiction.

Standard Bank and Trust carries the argument even further, maintaining that the EFAA did not delegate to the Federal Reserve Board adjudicatory power over private disputes, for several reasons: (a) the plain language of the Act does not make such a delegation; (b) such a delegation would exceed the Board's enumerated powers under the Federal Reserve Act; (c) the Board itself recognizes no such delegation; and (d) such a delegation would be an unconstitutional interpretation of the EFAA. SBT Brief, pp. 3-12.

Contrary to the reasoned and thorough analysis provided by the parties seeking rehearing, the Seventh Circuit's opinion is striking in its brevity. Without citation to any contrary authority and absent any reasoned analysis, the Seventh Circuit rejects the arguments presented. Instead, it relies only on its mistaken interpretation of the EFAA

which is unsupported by the plain language utilized by Congress and is in conflict with the Board's interpretation.

It is necessary for the Court to resolve this issue to carry out the purposes of the EFAA. Absent this Court's intervention,

[b]anks, which have already seen their check fraud losses soar as a result of the EFAA, will now experience even greater losses if they are deprived of remedies for violations of [sic - the] EFAA and Regulation CC. The confusion and uncertainty as to the proper method for dispute resolution will in itself create significant damage. Indeed, such a result would deter banks from fulfilling the very purpose of [sic - the] EFAA—expediting funds availability—except to the extent they are legally compelled to do so.

NYCH Brief, pp. 3-4.

Absent this Court's intervention, the Seventh Circuit's opinion will defeat the purpose of the EFAA. The Seventh Circuit's erroneous decision places all banks in the same precarious position as faced by Petitioner which has already suffered an actionable loss for which it will have no remedy. In the face of increased risk mandated by the funds availability provisions of the EFAA, the Seventh Circuit has stripped all banks of their ability to avail themselves of the judicial remedy Congress intended and implemented in the EFAA through its delegation to the Federal Reserve Board.

II.

The Seventh Circuit improperly ignored precedent establishing that there is subject matter jurisdiction under 28 U.S.C. Sec. 1331 because this cause arose under the laws of the United States.

As indicated above, the Seventh Circuit's decision conflicts with the plain language of the EFAA wherein it pro-

vides a specific grant of authority to pursue actions for civil liability in the Federal district courts. However, not only did the Seventh Circuit ignore the unambiguous statutory language, but it also ignored precedent concerning the application and interpretation of the general jurisdictional statute, Title 28 U.S.C. 1331. The reviewing court's conclusion could thereby impact every analysis undertaken to determine under what circumstances a federal governmental agency's regulation rises to the level of a law for purposes of Section 1331.

Pursuant to the general federal question jurisdictional statute, "[t]he district courts shall have original jurisdiction of all civil actions arising under . . . laws . . . of the United States." 28 U.S.C. Sec. 1331. When construing Section 1331, courts have repeatedly recognized that for general jurisdictional purposes, rules and regulations promulgated by governmental agencies pursuant to a mandate or a delegation of Congressional authority have the force and effect of laws. *Chasse v. Chasen*, 595 F.2d 59 (1st Cir. 1979)⁸; *Farmer v. Philadelphia Electric Company*, 329 F.2d 3 (3rd Cir. 1964). (Citations omitted.) "In general, this [the reference to laws of the United States in Section 1331] means that there is jurisdiction of a claim arising under an Act of Congress or an **administrative regulation or executive order** made

⁸ In *Chasse* the court indicated two (2) factors which must be weighed to determine if the agency regulation rises to the level of a law for jurisdictional purposes: (1) the statutory authority for the promulgation; and (2) the formality of the promulgation. Although the court in *Chasse* did not reach the issue concerning formality, there can be no question that Regulation CC would pass any such test. Prior to its codification, it passed scrutiny through publication in the Federal Register as required by the Administrative Procedure Act, Title 5 U.S.C. Sec. 551 *et seq.*, and then was officially promulgated as reflected by its citation in the Code of Federal Regulations.

pursuant to an Act of Congress." Wright, Miller & Cooper, *Federal Practice and Procedure, Jurisdiction* 2d, Sec. 3563 at 51 (1984) (emphasis added).

In its recent pronouncements, the Court has determined that an action "arises under" a law of the United States when federal law creates the cause of action. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983). The Court has repeatedly confirmed that a " 'suit arises under the law that created the cause of action.' " *Merrell Dow Pharmaceutical v. Thompson*, 478 U.S. 804, 808, (1986) quoting *Franchise Tax Board*, 463 U.S. at 8-9 and *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 at 260 (1916). First Illinois' cause of action, as pled in its complaint, "arises under" federal law because it was federal law that created it, and absent federal law, the cause of action does not exist.

When determining whether a Congressionally authorized agency regulation will support a federal cause of action, the court must look to the regulation itself to see if the regulation contemplates a judicial remedy. See *Stevens v. Carey*, 483 F.2d 188 (7th Cir. 1973) (the Seventh Circuit concluded Executive Order 10988 was insufficient to provide a jurisdictional basis examining only the language of the Executive Order itself which, contrary to Regulation CC, did not expressly or by implication contemplate a judicial remedy for its violation); *Chasse, supra*, (a Customs Service Circular on which the plaintiff based his cause of action failed to support federal jurisdiction because the circular itself did not contemplate a judicial remedy); and *Farmer, supra*, (after determining that the regulation in question was a law for purposes of Section 1331, the court then examined the regulation, not the statute, in order to analyze whether a judicial remedy was contemplated).

The court's failure to apply the analysis established by precedent has greater implications than merely depriving Petitioner of the remedy to which it is entitled. It will diminish Congress' ability to effectively delegate authority to federal agencies to promulgate regulations to be enforced by private parties in federal court. In the case of Regulation CC and the EFAA, the court's decision has subverted the purpose of the Act, and at best, will lead to the rather anomalous result forcing each state to interpret and apply a Federal Regulation promulgated pursuant to a Federal Statute. Certainly, the national banking system deserves uniformity in application of Federal Reserve Board regulations and the protection contemplated by Congress when it enacted the EFAA.

CONCLUSION

For each of the foregoing reasons, Petitioner, First Illinois Bank, respectfully requests that this Court grant this Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JEFFREY S. BLUMENTHAL
Counsel of Record
KAMM & SHAPIRO, LTD.
230 West Monroe Street
Suite 1100
Chicago, Illinois 60606
(312) 726-9777
Attorney for Petitioner

APPENDIX

App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3251

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6324—Charles P. Kocoras, Judge.

ARGUED APRIL 13, 1994—DECIDED JULY 11, 1994

Before CUMMINGS, EASTERBROOK and MANION, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In April 1992 plaintiff First Illinois Bank & Trust ("First Illinois") filed an amended complaint against Midwest Bank & Trust Company ("Midwest") complaining that Midwest returned a \$64,294.27 check unpaid and negligently failed to advise First Illinois that the check was NSF (Not Sufficient Funds). First Illinois claimed Midwest violated its duty under Regulation CC (12 CFR part 229) to give a reason for returning a check unpaid. 12 CFR §§ 229.30(d), 229.33(b)(8). Pursuant

to 12 CFR § 229.38(a), First Illinois sought to recover damages resulting from Midwest's alleged negligence. Subsequently Judge Kocoras granted First Illinois' motion for summary judgment, simultaneously denied summary judgment to Midwest, and entered judgment for First Illinois for \$43,912.06, the claimed amount of its loss. The district court found that Midwest had breached the standard of care imposed by Regulation CC by returning the check without advising First Illinois that the check was NSF. Midwest thereafter appealed from the judgment below.

At the April 13, 1994, oral argument in this Court, we questioned whether the district court had jurisdiction over this controversy and ordered both parties to file memoranda concerning that question. We now hold that the district court had no such jurisdiction.

Jurisdiction is supposedly granted under the Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010), in particular by 12 U.S.C. § 4010, titled "Civil liability." Subsection (d) ("Jurisdiction") provides that "any action under this section may be brought in any United States district court. . . ." 12 U.S.C. § 4010(d). But subsection (a) ("Civil liability") limits the application of the section to certain disputes between "any depository institution" and "any person other than another depository institution." 12 U.S.C. § 4010(a). Because the parties concede that both First Illinois and Midwest Bank are "depository institutions" within the meaning of the Expedited Funds Availability Act, 12 U.S.C. § 4001(12), we have no jurisdiction over this dispute.

Disputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

The purpose of the Expedited Funds Availability Act is to require banks to make funds available to depositors quickly. Thus the depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings.

The judgment below is vacated and the action is remanded to the district court with instructions to dismiss it for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

App. 4

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: July 11, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge

No. 93-3251

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 6324, Charles P. Kocoras, Judge

The judgment of the District Court is VACATED and the case is REMANDED with instructions, in accordance with the decision of this court entered on this date. Each party shall bear their own costs.

App. 5

[August 31, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 6324

FIRST ILLINOIS BANK TRUST,
an Illinois Banking Corp.,

Plaintiff,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corp.,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated below, summary judgment is granted in favor of the plaintiff.

BACKGROUND

The plaintiff, First Illinois Bank & Trust ("First Illinois") brings this action against defendant, Midwest Bank & Trust ("Midwest"), alleging that Midwest breached its regulatory duty to use ordinary care and to act in good faith in returning a check to First Illinois. The parties have stipulated to the following uncontested facts.

Both First Illinois and Midwest are engaged in the business of banking and use as their clearing house for collection the Federal Reserve Bank of Chicago. Accordingly, both banks are subject to the provisions of 12 C.F.R. Part 229 (1993).

In September of 1991, one of First Illinois' commercial depositors was Panadyne Telecom ("Panadyne"). On September 25, 1991, Panadyne deposited in its account at First Illinois a check for \$64,294.27. Panadyne was the payee and Magna Card Corporation ("Magna Card") was the maker of the check. Magna Card's check was drawn upon its account at Midwest.

On September 25, First Illinois, using normal banking channels, forwarded the check in question through the Federal Reserve System for collection. Midwest received the check through the Federal Reserve System on September 26, 1991. At that time, Margaret Straumann, a Midwest employee of thirty-two years, segregated the check as a large item according to bank policy. Straumann then examined the check for proper endorsement, again in accordance with established policy. Straumann found that First Illinois' proof stamp on the back of the check was so faint that it was illegible to her. Having determined that the endorsement did not conform to Midwest's standards, Straumann decided to return the check. She therefore placed Midwest's return stamp on the face of the check and noted that the reason for its return was for "guarantee of endorsement."

Under Midwest's procedures, when Midwest returns a check for guarantee of endorsement, it is not the practice of Midwest to further examine the depositor's account for available funds to pay the check if the endorsement has not satisfied its standards. On September 26, the day

the check was first presented for payment, Midwest's records reflected that the Magna Card account had a balance of \$275.31. If Straumann had not returned the item for the guarantee of endorsement, under bank policy the check would have continued to be processed and the next morning, September 27, 1991, the check would have appeared on the overdraft report and returned for non-sufficient funds ("NSF") that day. Moreover, if Straumann had known at the time she returned the check for guarantee of endorsement that the check was NSF, she would have indicated it was NSF when she returned the check.

First Illinois received the returned check on September 27, 1991. Midwest and First Illinois have the same procedure when a check that has been deposited to its depositor's account is returned by another bank for guarantee of endorsement. The procedure is to verify whether the payee received credit for the funds, and if it did, the bank will affix its guarantee of endorsement stamp and redeposit the check for clearance through the Federal Reserve System. Mary Ann Dahms, a First Illinois employee, followed this procedure upon receipt of the returned check, redepositing it on September 27, 1991.

Midwest states that although it, like First Illinois, would not "charge back" a check returned for missing endorsement, Midwest might place a freeze on the account so that there could not be a withdrawal against those uncollected funds. When deposits of over \$5,000 are received by Midwest's tellers, however, those tellers do not at that time normally give notice to the customer that any of the amount represented by that deposit will be held frozen for longer than normal policy recommends.

The redeposited check reached Midwest on Monday, September 30, 1991. Midwest processed the check and

generated a report showing that there were insufficient funds in Magna Card's account to pay the check. On October 1, Midwest again dishonored the check and returned it unpaid. This time the reason given for the return was NSF.

First Illinois and Midwest both publish their fund availability policies. These policies are set forth in brochures that each bank publishes and distributes to depositors. Both First Illinois and Midwest make funds available to depositors the next business day following the deposit. First Illinois does reserve the right to delay making funds available if it believes a check will not be paid or if the depositor has deposited checks totalling more than \$5,000. In practice, however, First Illinois makes all deposits, regardless of amount, available for withdrawal the next business day after deposit. The only exceptions to this practice are not applicable in this case.

In accordance with its policy, First Illinois allowed Pandyne to withdraw thousands of dollars from its account over the period between September 26 and September 30, prior to the time it was given NSF notice by Midwest. As a result of these withdrawals, First Illinois paid out \$43,916.06 that to date have gone uncollected. In its motion for summary judgment, First Illinois contends that Midwest owes it the amount it has lost, \$43,916.06, due to Midwest's failure to advise First Illinois of the NSF status of the Magna Card check when it was first returned. Midwest, in its motion for summary judgment, denies that it owes First Illinois the money for a variety of reasons, including absence of duty and failure to establish proximate cause. Before discussing the merits of the parties' contentions, we first address the legal principles used when deciding a motion for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine issue" exists if "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A "material fact" exists only if there is a factual dispute that is outcome determinative under governing law. *Id.* at 248; *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987).

The party seeking summary judgment has the initial burden of showing that no such issue of material fact exists. After a properly supported motion for summary judgment has been made, the opposing party then must "set forth specific facts showing that there is a genuine issue for trial." *Id.* Like the movant, the nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather he must support his contentions with proper documentary evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Howland*, 833 F.2d at 642. We view the record and all inferences drawn from it in the light most favorable to the party opposing the motion, and summary judgment is only appropriate when no reasonable jury could find for the non-moving party. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992) (citations omitted).

We apply these principles to the facts of this case.

DISCUSSION

In its motion for summary judgment, First Illinois argues that Midwest did not exercise ordinary care and acted in bad faith in returning the Magna Card check in violation of 12 C.F.R. §§ 229.30(d), 229.33(b)(8), and 229.38(a) (1993). Sections 229.30(d) and 229.33(b)(8) impose on a payor bank such as Midwest an obligation to provide the reason for non-payment when returning a check unpaid. Section 229.38(a) provides that a "bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart." First Illinois asserts that Midwest's violation of these regulations caused it to lose \$43,912.06.

Ordinary care is that conduct undertaken by a reasonably careful person under similar circumstances. *Hardware State Bank v. Cotner*, 302 N.E.2d 257, 262 (Ill. 1973). In this case, ordinary care is conduct conforming to a general banking usage whereby reasonable commercial standards are employed. See 810 ILCS 5/3-103(7) and 5/4-103(c) (1993). After reviewing the facts presented by the parties, it is the view of this Court that Midwest failed to exercise ordinary care because it did not act according to reasonable banking standards.

First Illinois presents evidence in its Statement of Material Facts submitted pursuant to local rule 12(m) showing that at the time of the events in dispute Midwest utilized a procedure to process its checks which was not utilized by any other bank. Midwest's procedure, unlike procedures at other banks, allowed a check to be returned for the reason that it was missing an endorsement without the bank first knowing that it was NSF. First Illinois bases its claim that Midwest utilized an uncommon system on testimony by Mr. Parillo, the Vice President and Cashier at Midwest, who has over thirty years banking

experience. Parillo testified at his deposition that no other bank uses the same procedure as Midwest Bank. In addition, Parillo indicated that no other bank would return a check claiming it was missing an endorsement if that check was also NSF. Every other bank would return the check NSF. First Illinois contends that Midwest's utilization of this unique check-return system resulted in Midwest's failure to advise First Illinois of the NSF status of the check upon its first return and that Midwest's inaction constituted a failure to comply with the standard of ordinary care and good faith imposed by section 229.38(a). We agree.

Although Midwest attempts to discredit the testimony of Parillo, we do not find its efforts convincing. Midwest files no statement of facts in which it denies First Illinois' Statement of Material Facts. Moreover, Midwest offers no evidence countering the statements made by Parillo, that is, evidence from which a reasonable jury could find that it employed a commercially reasonable system of check return.

Our finding that Midwest did not exercise ordinary care in utilizing its unique system of check return is bolstered by the foreseeable consequences to Midwest of employing such a check-return system. Because all other banks would have informed First Illinois that the Magna Card check was NSF if that were the case, First Illinois acted in a reasonably foreseeable manner in assuming that upon receipt of the check the drawer had sufficient funds on account at Midwest to pay. Midwest points to no evidence suggesting that First Illinois knew or suspected that Midwest followed a check-return procedure different from other banks. Furthermore, First Illinois presents persuasive evidence that Midwest probably would have acted similarly to First Illinois in making funds available to

Panadyne at the time and in the manner in which it did. The evidence shows that First Illinois and Midwest employ substantially similar policies regarding crediting customers' accounts. In light of the following, we find that Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check. Additionally, we find Midwest's failure to act caused First Illinois to suffer damage in the amount of \$43,912.06.

Under the relevant regulations, a payee bank which returns a check unpaid must use ordinary care in giving the reason for return. When the instant check was returned *only* for a guarantee of endorsement and not for any other reason or reasons, it was reasonable for First Illinois to assume that the claimed endorsement defect was the only defect which had to be cured. When the endorsement was guaranteed, it was entirely reasonable for First Illinois to expect the check to be honored, for Midwest had proffered no other reasons, including insufficient funds, as a reason the check failed in going through banking channels. It is simply an untenable position to suggest that is ordinary business practice that the reasons for dishonor can be investigated one at a time and the check returned in successive stages over a substantial period of time, particularly when the means to determine insufficiency of funds, an important reason for dishonor, is readily available. It would have taken minimal effort and time for Ms. Straumann to have made that determination and to have notified First Illinois at the same time as the matter of the endorsement was raised. Failure to timely notify First Illinois of an insufficiency of funds problem, particularly when the effort to discern same was so minimal, permitted First Illinois to reasonably conclude that the endorsement was the *only* problem. Midwest

Bank was in the superior position to detect that problem with the check, and it must now bear the consequences of its own neglect.

Midwest presents several arguments why summary judgment should be granted in its favor, but we find none of them persuasive. For example, Midwest points out that First Illinois was not required to allow withdrawals against the uncollected funds when it did and that Midwest cannot be responsible for actions taken by First Illinois that were not necessitated by Midwest's failure to specify NSF in its first notice. Just because First Illinois was not "required" to allow withdrawals under the regulations, however, does not mean that Midwest should not have reasonably foreseen what damage its breach of ordinary care would cause. The evidence indicates that Midwest employed similar procedures as First Illinois in regard to checks returned for guarantee of endorsement and, therefore, Midwest's argument that it was not reasonably foreseeable that First Illinois would be damaged by its breach is unconvincing.

Midwest additionally argues that, even if it had exercised ordinary care in this case by sending back the check NSF, First Illinois would not have received that notice in time to prevent its loss.¹ Midwest fails to persuade us with this tack because it, *inter alia*, conflicts with Midwest's stipulation that "[h]ad Ms. Straumann not returned the item for the guarantee of endorsement, the check would have continued to be processed and the next morn-

¹ Under section 229.38(a), a bank that fails to exercise ordinary care or act in good faith may be liable to the depository bank in an amount equal to "the loss incurred up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care."

App. 14

ing [Sept. 27] it would have appeared on the overdraft report and returned "NSF" *that day.*" (emphasis added). Although it is not clear exactly when the check returned NSF would have been received by First Illinois, the evidence shows that Midwest would have placed a phone call to First Illinois notifying it of the NSF status of the Magna Card check on September 27, thereby preventing the loss in question. Accordingly, Midwest's motion for summary judgment is denied.

CONCLUSION

For the reasons stated above, summary judgment is granted in favor of the plaintiff.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: August 31, 1993

App. 15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

First Illinois Bank & Trust

v.

Midwest Bank & Trust Co.

CASE NUMBER: 92 C 6324

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is entered in favor of the plaintiff and against defendant in the amount of \$43,912.06. Final judgment entered.

August 31, 1993
Date

/s/ H. Stuart Cunningham
Clerk

/s/
(By) Deputy Clerk

App. 16

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92 C 6324 Date: Tue 31 Aug 1993

Name of Assigned Judge: Charles P. Kocoras

Case Title: First Illinois Bank Trust -v- Midwest
Bank & Trust Co.

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Ruling held. ENTER MEMO-
RANDUM OPINION: Defendant's motion (Doc 39-1)
for summary judgment is denied. Plaintiff's motion
(Doc 37-1) for summary judgment is granted in the
amount of \$43,912.06. Final judgment entered. All
other pending motions, if any, are hereby moot.

(11) ☒ [For further detail see order attached to the orig-
inal minute order form.]

* * * * *

App. 17

[November 25, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 6324

FIRST ILLINOIS BANK & TRUST,
an Illinois banking corporation,

Plaintiff,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois banking corporation,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on defendant's motion
to dismiss pursuant to Federal Rule of Civil Procedure
12(b)(6). For the following reasons, we deny defendant's
motion.

LEGAL STANDARD

The defendant asks this Court to dismiss plaintiff's case
pursuant to Federal Rule of Civil Procedure 12(b)(6). A
defendant must meet a high standard in order to have
a complaint dismissed for failure to state a claim upon
which relief may be granted. In ruling on a motion to dis-
miss, the court must construe the complaint's allegations
in the light most favorable to the plaintiff. *Scheuer v.*

Rhodes, 416 U.S. 232, 235 (1974). The allegations of the complaint should be construed liberally, and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conly v. Gibson*, 355 U.S. 41, 45-46 (1957); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). A complaint will not be dismissed on mere vagueness. *Strauss v. Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). We address defendant's motion with these principles in mind.

FACTUAL BACKGROUND

The plaintiff, First Illinois Bank & Trust ("First Illinois"), brings this action against the defendant, Midwest Bank & Trust Company ("Midwest"). First Illinois alleges that Midwest breached its regulatory duty to use ordinary care and to act in good faith in returning a check to First Illinois.

First Illinois claims that on or about September 25, 1991, its customer, Pandayne Telecom ("Pandayne"), deposited a check with First Illinois for \$64,294.27. The check was drawn by Magna Card on its account at Midwest. First Illinois, upon receiving the check from Pandayne, sent the check for collection to Midwest through normal banking channels. According to First Illinois, on this date, Magna Card possessed insufficient funds in its account at Midwest to pay the \$64,294.27 check.

First Illinois contends that on September 26, Midwest returned the check to First Illinois. Midwest indicated on the face of the check that the reason for its return was that it was not endorsed properly. Midwest did not indicate on the face of the check that Magna Card possessed

insufficient funds in its account to pay the balance of the check.

Between September 26 and October 1, First Illinois believed that Magna Card possessed sufficient funds to pay the check to Pandayne. Acting upon this belief, First Illinois credited Pandayne's account for \$64,294.27. Pandayne made withdrawals against this sum in the amount of \$43,912.06. On October 1, Midwest notified First Illinois that there were insufficient funds in Magna Card's account to pay Pandayne. First Illinois immediately set off the remaining balance in Pandayne's account.

In its complaint, First Illinois alleges two counts against Midwest. In its first count, First Illinois charges that Midwest failed to exercise ordinary care in the manner it returned the check to First Illinois. First Illinois claims that Midwest (1) erroneously returned the check stating that the endorsement or the guaranty of that endorsement was improper; and/or (2) failed to check Magna Card's account to determine if there were sufficient funds in the account to pay the check prior to returning it unpaid for the sole reason that the endorsement was improper; and/or (3) failed to notify plaintiff in a timely manner that there were insufficient funds in Magna Card's account to pay the check. In its second count, First Illinois charges that Midwest acted in bad faith in the collusive manner it returned the check to First Illinois. First Illinois contends that both Midwest and Magna Card knew that there were insufficient funds in Magna Card's account on or before the date of September 26. In spite of this, Magna Card is alleged to have requested that Midwest return the check without advising First Illinois of the insufficient funds, in order to induce First Illinois into believing sufficient funds existed.

In response to First Illinois' allegations, Midwest has filed this motion to dismiss, alleging that First Illinois possesses no legal basis for its claims. Because we find that First Illinois states a sufficient basis for relief, we deny Midwest's motion.

DISCUSSION

First Illinois claims that Midwest did not exercise ordinary care or act in good faith in complying with the following Federal Reserve regulations: 12 C.F.R. §§ 229.30(d), 229.33(a), and 229.33(b)(8) (1992). Section 229.30(d) requires a paying bank that is returning a check to clearly indicate on the face of the check that it is a returned check and the reason for its return. Section 229.33(a) requires the paying bank that decides to return a check to provide notice of nonpayment to the depository bank by 4:00 p.m. on the second business day following the banking day on which the check was presented to the paying bank. Under § 229.33(b)(8), the notice of return must include the reason for nonpayment.

First Illinois alleges that Midwest acted in violation of 12 C.F.R. § 229.38(a), a Federal Reserve regulation that requires banks to "exercise ordinary care and act in good faith in complying with the requirements" of subpart 229. Under § 229.38(a), a paying bank that fails to exercise ordinary care or act in good faith may be liable to the depository bank for damages.

The parties dispute how § 229.38(a) should be applied to the facts of this case. The comments to § 229.38(a) provide a clue as to how this provision should be applied. They indicate that the standard of care established by § 229.38(a) is similar to the standard imposed by U.C.C. §§ 1-203 and 4-103(1). See 12 C.F.R. Appendix E, com-

ments on § 229.33(a).¹ U.C.C. § 1-203 states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 4-103 provides that a bank is responsible to act with ordinary care and in good faith in relation to other banks. U.C.C. § 4-103(a). Moreover, this section provides that a bank in compliance with the Federal Reserve regulations has *prima facie* exercised ordinary care. U.C.C. § 4-103(c).

Midwest argues that under its interpretation of the Federal Reserve regulations at issue in this case, it has met all applicable regulatory requirements. Therefore, Midwest claims that under U.C.C. § 4-103(c) it has *prima facie* exercised ordinary care. Midwest, however, fails to persuade this Court. First Illinois alleges in its complaint that Midwest has not complied with the Federal Reserve regulations. It claims that Midwest violated § 229.38(a) in failing to exercise ordinary care and good faith in the manner in which it returned the Pandayne check. The question of how to interpret the provisions of subpart 229 at issue in this case, § 229.30(d) (interpreting what constitutes a good-faith reason for returning a check) and §§ 229.38(a) and 229.38(b)(8) (interpreting whether timely and adequate notice was given in good faith), are questions of fact that will turn on reasonable commercial standards of fair dealing. Midwest's argument that U.C.C. § 4-103(c) absolves it of liability is unsupported.

In addition, Midwest fails to acknowledge the comments' analogy to U.C.C. § 1-203. We believe that U.C.C. § 1-203's general notion of good faith and fair dealing would em-

¹ The comments also indicate that liability for wrongful dishonor under U.C.C. § 4-402 is different from a failure to exercise ordinary care under § 229.38(a). 12 C.F.R. Appendix E, comments to § 229.38(a).

App. 22

brace First Illinois' allegations of misidentification and collusion. Furthermore, we note that a recent amendment to subpart 229 defines § 229.38(a)'s standard of good faith to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." 57 Fed. Reg. 46,972; 46,975 (October 14, 1992) (to be codified at 12 C.F.R. § 229.2(nn)). Based on the foregoing, we conclude that First Illinois should be allowed to prove its claims based on § 229.38(a). Hence, we deny Midwest's motion to dismiss.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: November 25, 1992

App. 23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92 C 6324

Date: 25 Nov 1992

Name of Assigned Judge: Charles P. Kocoras

Case Title: First Illinois Bank Trust -v- Midwest
Bank & Trust Co.

* * * * *

DOCKET ENTRY:

MINUTE ORDER of 11/25/92 by Hon. Charles P. Kocoras: Enter memorandum opinion that defendant's motion to dismiss plaintiff's action for failure to state a claim is denied [8-1]. Answer to complaint is due 12/15/92. Status hearing is set for 12/28/92 at 9:30 a.m. Mailed notice (1g) [Entry date 11/27/92]

App. 24

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1994

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee,

No. 93-3251 vs.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6324—Charles P. Kocoras, Judge.

ORDER

The opinion dated July 11, 1994, is hereby amended by substituting the following paragraph for the last paragraph on page 2:

Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1)

App. 25

(or perhaps in state court). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.

On August 25, 1994, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc*. On August 29, 1994, by leave of Court, the Board of Governors of the Federal Reserve System, the New York Clearing House Association and the Standard Bank and Trust Company filed briefs *amici curiae* in support of the petition for rehearing.

No judge in active service has requested a vote on the suggestion for rehearing *en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.